BADAN PENGURUSAN BERSAMA PARADESA RUSTIKA

v.

SRI DAMANSARA SDN BHD

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
[CIVIL APPEAL NO: 02(f)-99-12-2012(W)]
29 OCTOBER 2013

LAND LAW: *Management property - Common property - Joint management body (JMB), establishment of - Claim for monies from developer of condominium responsible for collection of monthly maintenance and sinking fund charges - Whether developer as defined in s. 16 of the Building and Common Property (Maintenance and Management) Act 2007 ('the Act') required to open Building Maintenance Account ('BMA') when vacant possession has been delivered before commencement of Act - Whether Act came into operation more than seven years after units delivered to purchasers - Whether provisions of the Act has retrospective effect - Whether developer required to deposit all monies from purchasers for purposes of maintenance and management of common property and sinking funds pursuant to s. 21 of the Act - Sum claimed part of sinking funds kept by developer under deed of mutual covenant entered into by respondent and purchasers before commencement of the Act - Whether Commissioner of Buildings lacked jurisdiction under s. 16(5) of the Act to make decision on sum claimed*

LAND LAW: *Strata title - Joint management body (JMB), establishment of - Claim for monies from developer of condominium responsible for collection of monthly maintenance and sinking fund charges - Whether developer as defined in s. 16 of the Building and Common Property (Maintenance and Management) Act 2007 ('the Act') required to open Building Maintenance Account ('BMA') when vacant possession has been delivered before commencement of the Act - Whether Act came into operation more than seven years after units delivered to purchasers - Whether provisions of the Act has retrospective effect - Whether developer required to deposit all monies from purchasers for purposes of maintenance and management of common property and sinking funds pursuant to*

s. 21 of the Act - Sum claimed part of sinking funds kept by developer under deed of mutual covenant entered into by respondent and purchasers before commencement of the Act - Whether Commissioner of Buildings lacked jurisdiction under s. 16(5) of the Act to make decision on sum claimed

The appellant, a Joint Management Body ("JMB") of Paradesa Rustika Condominium ('the condominium'), was established pursuant to the provisions of the Building and Common Property (Maintenance and Management) Act 2007 ('the Act'). Prior to the formation of the appellant, the respondent (the developer of the condominium) was responsible for the collection of monthly maintenance and sinking fund charges from the purchasers of the units. Shortly after the appellant was established, the respondent transferred to the appellant a sum of RM151,206.99 being the sinking funds collected by it. The appellant, however, discovered that there was a shortfall of RM505,722.36 ('the said sum') in the monies collected by the respondent and thus made a claim for the said sum. The respondent disputed the claim and argued that the said sum claimed was used to reimburse itself as the developer towards the maintenance and rehabilitation of the condominium. The matter was referred to the Commissioner of Buildings ('the Commissioner'). The Commissioner demanded that the respondent pay the said sum claimed by the appellant. As the respondent failed to pay the said sum, the appellant made a complaint to the Commissioner but was informed that the Commissioner had no power under the Act to take any action in respect of such failure. The appellant commenced an action by way of originating summons pursuant to s. 41 of the Specific Relief Act 1950 and s. 22(1) of the Act in the High Court seeking a declaration that the respondent owed the appellant the said sum as decided by the Commissioner. The High Court allowed the appellant's claim. However, the Court of Appeal had allowed the respondent's appeal on the ground that the Commissioner lacked jurisdiction under s. 16(5) of the Act to decide with regard to the said sum claimed. Leave to appeal to the Federal Court was granted to the appellant in respect of these questions, *inter alia* (i) in construing s. 16 of the Act, whether a developer as defined in the Act was required to open a building maintenance account when vacant possession of the development area had been delivered before commencement of the Act; and (ii) whether a developer prior to commencement of the Act was required to

A open and maintain an account to deposit all monies from the purchasers for purposes of maintenance and management of the common property and sinking fund ('the account') pursuant to s. 21 of the Act.

B **Held (dismissing appeal)**
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) It is provided for under sub-s. 16(1) of the Act, that where a developer undertakes the development on one lot which is intended to be subdivided into individual units ('parcels') which is held or will be held under a strata title ('development area'), he must open and maintain a building maintenance account for such development area before delivery of vacant possession. The account must be maintained under the establishment of a JMB for the building. The said Act came into operation on 12 April 2007, but vacant possession of the units in the condominium herein were already delivered to the purchasers on 28 January 2000. The said Act came into operation more than seven years after possession of all the units in the condominium had been delivered by the respondent to the purchasers. The provisions of the Act does not have retrospective effect. Thus, the requirement in relation to the opening and maintenance of the Building Maintenance Account did not apply to the respondent. It is a trite proposition that an Act of Parliament only comes into operation from the date the Act provides for the same (s. 19 of the Interpretation Acts 1948 and 1967). (paras 15 & 16)

(2) Under s. 21 of the Act, a developer of a development area which had been completed before or on the commencement of the Act who had collected and expended monies for the purpose of the maintenance and management of the common property and sinking fund prior to the commencement of the Act, must submit to the commissioner not later than six months after the commencement of the Act, an account audited by a professional auditor. However, there was no provision under the Act which deems such account to be the building maintenance account for the development area and there was no provision requiring any money still available in such account to be transferred to a building maintenance

account. As such, the requirement under sub-s. 22(1) of the Act that not later than one month from the date of the establishment of the JMB, any money remaining in the building maintenance account after payment of any expenditure properly charged to that account, must be transferred to the JMB, did not apply to the respondent. (para 17)

(3) The said sum was part of the sinking funds kept by the respondent under the deed of mutual covenant entered into by the respondent and the purchasers before the commencement of the Act. The Commissioner, however, seemed to have wrongly applied the respondent's case under s. 24 of the Act which imposed upon the JMB the duty to open and maintain a sinking fund from a portion of the monies in the Building maintenance fund after its creation. Section 24 of the Act had no relevance to the usage by the respondent of the said sum. The dispute between the parties was clearly not a dispute in respect of a building maintenance account. Hence, the Commissioner lacked jurisdiction under s. 16(5) of the Act, or under any other provision of the Act, to give any decision with regard to the sum the appellant claimed must be paid over to them. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, Badan Pengurusan Bersama ('BPB') Kondominium Paradesa Rustika ("kondominium"), telah ditubuhkan di bawah peruntukan Akta Bangunan Dan Harta Bersama (Penyenggaraan Dan Pengurusan) 2007 ('Akta'). Sebelum penubuhan perayu, responden (pemaju kondominium) bertanggungjawab bagi kutipan bayaran bulanan dan caj-caj dana jaminan daripada pembeli-pembeli unit. Tidak lama selepas perayu ditubuhkan, responden telah memindahkan kepada perayu wang berjumlah RM151,206.99 iaitu dana jaminan yang dikumpul olehnya. Perayu, walau bagaimanapun, mendapati bahawa terdapat kekurangan sebanyak RM505,722.36 ('jumlah tersebut') dalam wang yang telah dikutip oleh responden dan dengan itu membuat permohonan untuk jumlah tersebut. Responden mempertikaikan permohonan dan menghujahkan bahawa jumlah yang dipohon telah digunakan untuk membayar balik pemaju terhadap pemeliharaan dan pemulihan kondominium. Hal perkara tersebut telah dirujuk kepada Pesuruhjaya Bangunan ('Pesuruhjaya'). Pesuruhjaya mengarahkan responden membayar

jumlah yang dipohon oleh perayu. Oleh kerana responden gagal membayar jumlah tersebut, perayu membuat aduan kepada Pesuruhjaya tetapi telah dimaklumkan bahawa Pesuruhjaya tidak mempunyai kuasa di bawah Akta untuk mengambil tindakan berkenaan kegagalan tersebut. Perayu memulakan tindakan melalui saman pemula di bawah s. 41 Akta Relief Spesifik 1950 dan s. 22(1) Akta di Mahkamah Tinggi, memohon pengisytiharan bahawa responden berhutang dengan perayu jumlah tersebut seperti yang diputuskan oleh Pesuruhjaya. Mahkamah Tinggi membenarkan permohonan perayu. Walau bagaimanapun, Mahkamah Rayuan telah membenarkan rayuan responden atas alasan bahawa Pesuruhjaya tidak mempunyai bidangkuasa di bawah s. 16(5) Akta untuk memutuskan mengenai jumlah yang dipohon. Kebenaran untuk merayu ke Mahkamah Persekutuan telah dibenarkan kepada perayu berhubung persoalan-persoalan ini, antara lain (i) dalam mentafsirkan s. 16 Akta, sama ada pemaju sebagaimana yang ditakrifkan dalam Akta dikehendaki membuka akaun penyenggaraan bangunan apabila milikan kosong kawasan yang dimajukan itu diserahkan sebelum Akta dikuatkuasakan; dan (ii) sama ada pemaju sebelum Akta dikuatkuasakan dikehendaki membuka dan menyenggara satu akaun untuk mendepositkan kesemua wang daripada pembeli bagi tujuan penyenggaraan dan pengurusan harta bersama dan akaun dana jaminan ('akaun') di bawah s. 21 Akta.

Diputuskan (menolak rayuan)

Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Ia diperuntukkan di bawah sub-s. 16(1) Akta bahawa, di mana pemaju yang menjalankan pembangunan ke atas satu petak yang dicadangkan untuk dipecah bahagi kepada petak-petak individu ('bidang tanah') dipegang atau akan dipegang di bawah hakmilik strata ('kawasan yang dimajukan'), hendaklah membuka dan menyenggara akaun penyenggaraan bangunan untuk kawasan yang dimajukan tersebut sebelum penyerahan milikan kosong. Akaun tersebut hendaklah diselenggara di bawah penubuhan BPB sebuah bangunan. Akta tersebut mula berkuatkuasa pada 12 April 2007, tetapi milikan kosong unit kondominium tersebut telah pun diserahkan kepada pembeli pada 28 Januari 2000. Akta tersebut mula beroperasi tujuh tahun selepas pemilikan unit-unit kondominium telah diserahkan

oleh responden kepada pembeli. Peruntukan Akta tidak mempunyai kesan retrospektif. Oleh itu, peruntukan berhubungan dengan pembukaan dan penyenggaraan akaun penyenggaraan bangunan tidak terpakai terhadap responden. Ia adalah satu proposisi mantap bahawa Akta Parlimen hanya berkuatkuasa dari tarikh yang diperuntukkan oleh Akta (s. 19 Akta Tafsiran 1948 dan 1967).

(2) Di bawah s. 21 Akta, pemaju sebuah kawasan yang dimajukan yang telah disiapkan sebelum atau pada berkuatkuasanya Akta yang telah mengumpul dan mengeluarkan wang bagi tujuan penyenggaraan dan pengurusan harta bersama dan dana terjamin sebelum berkuatkuasanya Akta, harus menyerahkan kepada Pesuruhjaya akaun yang telah diaudit tidak lewat daripada enam bulan selepas berkuatkuasanya Akta. Walau bagaimanapun, tiada peruntukan di bawah Akta yang menganggap akaun sedemikian sebagai akaun penyenggaraan bangunan bagi kawasan yang telah dimajukan dan tiada peruntukan yang memerlukan wang yang masih terdapat dalam akaun itu dipindahmilik ke akaun penyenggaraan bangunan. Oleh itu, keperluan di bawah sub-s. 22(1) Akta bahawa tidak lewat dari satu bulan dari tarikh penubuhan BPB, wang yang masih kekal dalam akaun penyenggaraan bangunan selepas bayaran perbelanjaan yang telah dicajkan pada akaun, harus dipindahmilik ke BPB, tidak terpakai terhadap responden

(3) Jumlah tersebut adalah sebahagian daripada dana jaminan yang disimpan oleh responden di bawah surat ikatan perjanjian bersama yang dimeterai oleh responden dan pembeli sebelum berkuatkuasanya Akta. Pesuruhjaya walau bagaimanapun telah terkhilaf apabila meletakkan kes responden di bawah s. 24 Akta yang menguatkuasakan ke atas BPB kewajipan untuk membuka dan menyenggara akaun dana jaminan daripada bahagian wang dalam akaun penyenggaraan bangunan selepas penubuhannya. Seksyen 24 Akta tidak mempunyai kaitan dengan penggunaan jumlah tersebut oleh responden. Pertikaian antara pihak-pihak yang terlibat dengan jelasnya bukan pertikaian berkenaan akaun penyenggaraan bangunan. Oleh itu, Pesuruhjaya tidak mempunyai bidangkuasa di bawah s. 16(5) Akta, atau di bawah mana-mana peruntukan Akta, untuk membuat keputusan berhubung jumlah yang dipohon oleh perayu.

Legislation referred to:
Building and Common Property (Maintenance and Management) Act 2007, ss. 4(1), 16(1), (3), (5), 21(1), 22(1), 24
Interpretation Acts 1948 and 1967, s. 19
Specific Relief Act 1950, s. 41

For the appellant - Malik Imtiaz (Eric Tan, Chan Wei June & Parendeep with him); M/s Lim Soh & Goonting
For the respondent - Porress Royan (B Y Goh with him); M/s B K Goh & Goh

[Appeal from Court of Appeal; Civil Appeal No: W-02(NCVC)-1655-2011]

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

[1] This is an appeal by the appellant against the decision of the Court of Appeal in reversing the High Court decision given in favour of the appellant.

Background Facts

[2] The relevant background facts of the case may be summarised as follows:

(a) The appellant is the Joint Management Body ('JMB') of Paradesa Rustika Condominium ('the Condominium') established on 2 February 2008 pursuant to the provision of the Building and Common Property (Maintenance and Management) Act 2007 ('the Act'). The respondent was the developer of the condominium.

(b) Prior to the formation of the appellant, the respondent was responsible for the collection of monthly maintenance and sinking fund charges from the purchasers of the units of the condominium. Vacant possession of the units in the condominium were delivered to the purchasers on or about 28 January 2000.

(c) Shortly after the appellant was established the respondent transferred to the appellant a sum of RM151,206.99, being the sinking funds collected by it.

(d) The appellant discovered that there was a shortfall of RM505,722.36 ('the said sum') in the monies collected by the respondent towards the sinking funds. The appellant made a claim for the said sum from the respondent on or about 20 October 2008 at a meeting with its representative.

(e) The respondent disputed the claim made by the appellant. Consequently, the matter was referred to the Commissioner of Buildings ('the Commissioner') pursuant to the provision of the Act. The Commissioner, by way of letter dated 26 December 2008 to the respondent, requested an explanation for the respondent's failure to transfer the said sum claimed to the appellant.

(f) The respondent replied by way of letter dated 13 January 2009 that the said sum claimed was used to reimburse itself as the developer towards the maintenance and rehabilitation of the condominium.

(g) The Commissioner rejected the respondent's explanation and by way of letter dated 21 January 2009 demanded that the respondent return the said sum claimed to the appellant.

(h) As the respondent still did not pay the said sum, the appellant made a complaint to the Commissioner. However the appellant was informed that the Commissioner had no power under the Act to take any action in respect of such failure.

Proceedings In The High Court

[3] The appellant commenced an action by way of originating summons pursuant to s. 41 of the Specific Relief Act 1950 and s. 22(1) of the Act in the High Court seeking a declaration that the respondent owed the appellant the said sum as decided by the Commissioner. The learned judge of the High Court allowed the appellant's claim. In her grounds of judgment the learned judge *inter alia* held:

(a) The respondent's argument that the Commissioner had no jurisdiction to entertain or determine the matter was misconceived because of the respondent's conduct in not challenging the Commissioner's lack of jurisdiction at the time when he made the decision.

A (b) The Commissioner was empowered to resolve disputes in relation to the building maintenance account by virtue of s. 16(5) of the Act.

(c) The said sum formed part of the respondent's building
B maintenance account and the Commissioner was empowered under s. 22 of the Act to order the respondent as the developer to transfer that said sum into the appellant's building maintenance fund.

C **Decision Of The Court Of Appeal**

[4] In a unanimous judgment, the Court of Appeal allowed the respondent's appeal on the ground that the Commissioner lacked jurisdiction under s. 16(5) of the Act or any other provision of the Act to decide with regard to the said sum claimed by the
D appellant. The Court of Appeal also held that the respondent's consent or acquiescence in the proceedings before the Commissioner could not confer on him a power which had not been conferred on him by the Act.

E **[5]** The Court of Appeal's reasoning in arriving at its decision *inter alia* are:

(i) The decision of the Commissioner could only have been made under s. 16(5) of the Act. However the Act does
F not have retrospective effect;

(ii) The requirement in relation to the opening and maintenance of the building maintenance account did not apply to the respondent as the condominium had been completed and possession given to the parcel owners in
G the year 2000 which was seven years before coming into force of the provisions of the Act;

(iii) The account kept by the respondent for the condominium was not the building maintenance account which a
H developer was required to open and maintain under s. 16 of the Act before delivery of vacant possession;

(iv) Under s. 21 of the Act, it is the duty of a developer of a development area completed before the commencement of
I the Act and who has collected and expended monies for the maintenance and management of the common property and sinking fund prior to the commencement of the Act,

to submit to the Commissioner a professionally audited account of all such monies within six months of the commencement of the Act; A

(v) There is no statutory provision which deems the abovesaid account to be the building maintenance account. Neither is there a statutory provision requiring monies in the abovesaid account to be transferred to the building maintenance account; and B

(vi) The said sum claimed by the respondent was in fact part of the sinking funds kept by the respondent under the deed of mutual covenant entered into between the respondent as the developer and the purchaser of the condominium units before the commencement of the Act and thus the reference by the Commissioner to s. 24 of the Act was misplaced. C D

Leave To Appeal To The Federal Court

[6] On 12 November 2011 leave to appeal was granted to the appellant in respect of three questions of law as follows: E

(a) In construing s. 16 of the Act in its proper perspective and giving the Act a purposive interpretation as a whole, whether a developer as defined in the Act is required to open a building maintenance account when vacant possession of the development area has been delivered before commencement of the Act? F

(b) If the answer to (a) is in the negative, whether a developer prior to commencement of the Act is required to open and maintain an account to deposit all monies from the purchasers for purposes of maintenance and management of the common property and sinking funds ('the account') pursuant to s. 21 of the Act? G

(c) If the answer to (b) is the affirmative, whether the Commissioner of buildings has the powers and jurisdiction to determine any dispute arising from the account maintained by a developer prior to commencement of the Act? H

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A **Decision Of This Court**

[7] The principal issue to be determined in this appeal relates to the status to be accorded to the monies collected by the respondent as the developer for the purposes of repairs and
B maintenance of the condominium prior to the coming into force of the Act. It is a question of whether the said sum forms part of the respondent's building maintenance account. In this regard the issue is also related to the question as posed by the Court of Appeal as to whether the Commissioner has the jurisdiction under
C s. 16(5) of the Act or any other provision of the Act to decide with regard to the said sum.

[8] It is to be noted at the outset that s. 4(1) of the Act contemplates the establishment of the JMB consisting of the developer and the purchasers in two situations. The first situation
D is where a building has been completed before the commencement of the Act and vacant possession of the parcels has been delivered by the developer to the purchasers but the Management Corporation (established under the Strata Titles Act 1985) has not come into existence, the JMB shall be established not later
E than 12 months from the commencement of the Act. The second situation is where a building has been completed on or after the commencement of the Act, the JMB shall be established not later than 12 months from the date of delivery of vacant possession of the parcels to the purchasers.
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[9] Section 16(1) of the Act mandates the developer of any building, before delivery of vacant possession, to open a building maintenance account in respect of the development area in which the building is erected and by s. 16(3) of the Act, that account
G shall be maintained by the developer until the establishment of the JMB for that building.

[10] It is also to be noted that the Act contemplates the opening and maintenance of three accounts as follows:

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(a) Building maintenance account which is to be opened and maintained by the developer in respect of the development area in which the building is erected after the commencement of the Act but before the delivery of vacant possession of the units.
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(b) Building maintenance fund which is to be maintained by the JMB under s. 22 of the Act to which any surplus monies in the building maintenance account shall be transferred by the developer not later than one month after the establishment of the JMB.

(c) Sinking fund to be opened and maintained by the JMB under s. 24 of the Act and into which shall be paid such portion of the contribution to the building maintenance fund as may be determined by the JMB.

[11] Learned counsel for the appellant amongst others submitted before us that the respondent as a developer was obliged to account for such monies to the Commissioner pursuant to s. 21(1) of the Act which contemplated an account of monies collected prior to the coming into force of the Act. It was contended for the appellant that the learned judges of the Court of Appeal were wrong in concluding that the Act was only to apply prospectively. The duty to account is not limited to monies in the building maintenance account. Section 21(1) of the Act imposes such a duty with respect to all monies collected and expended for the purposes of maintenance and management of the common property and sinking funds, if any, prior to the commencement of the Act.

[12] It was also contended for the appellant that once a JMB has been established, it was required under s. 24 of the Act to open and maintain a sinking fund into which shall be paid such portion of the contribution to the building maintenance fund as may, from time to time, be determined by the JMB for the purposes of meeting its actual or expected liabilities.

[13] It was further contended for the appellant that s. 16 of the Act should not be interpreted literally. Literal interpretation of a statute is not applicable in all cases. The nature and purpose of a particular legislation must be considered when construing its various provisions so as not to defeat the intention of Parliament. Statutory provisions are to be construed harmoniously with other provisions of the statute and they are to be interpreted purposively.

[14] With respect to the above contention of learned counsel for the appellant we are not in agreement with him. The main relief sought for by the appellant was a declaration under s. 41 of the Specific Relief Act 1950 that the respondent owed it the said sum as of 31 July 2008 as decided by the Commissioner based on his letter dated 21 January 2009. In our view that declaration could only be made if the Commissioner had jurisdiction to make that decision. The Court of Appeal in its judgment was right in stating that it was not clear under which provision of the Act the Commissioner made the decision. However, in view of the reference in the Commissioner's letter dated 26 December 2008 to s. 22(1) of the Act, the Commissioner must have made his decision under s. 16(5) of the Act which provides that where any dispute arises in respect of a building maintenance account the Commissioner may resolve the dispute as he deems fit and just.

[15] It is provided for under sub-s. 16(1) of the Act that where a developer undertakes the development on one lot which is intended to be subdivided into individual units ('parcels') which is held or will be held under a strata title ('development area'), he must open and maintain a building maintenance account for such development area before delivery of vacant possession. The account must be maintained until the establishment of a JMB for the building. The said Act came into operation in Selangor, in which the condominium is situated, only on 12 April 2007 pursuant to Gazette Notification No: P.U.(B) 147/07, but vacant possession of the units in the condominium were already delivered to the purchasers on or about 28 January 2000. In other words, the Act came into operation more than seven years after possession of all the units in the condominium had been delivered by the respondent to the purchasers.

[16] It is therefore clear that the provisions of the Act do not have retrospective effect. The requirement in relation to the opening and maintenance of the building maintenance account in our view did not apply to the respondent as the condominium had long been completed, and possession of the individual units had been handed over to the purchasers more than seven years earlier. On this point the question of giving the provision of the Act a purposive interpretation as suggested by learned counsel for the appellant does not arise as the provision of the law is very clear.

It is a trite proposition that an Act of Parliament only comes into operation from the date the Act provides for the same. Section 19 of the Interpretation Acts 1948 and 1967 provides that:

> (1) The commencement of an Act or subsidiary legislation shall be the date provided in or under the Act or subsidiary legislation or, where no date is provided, the date immediately following the date of its publication in pursuance of s. 18.
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> (2) Acts and subsidiary legislation shall come into operation immediately on the expiration of the day preceding their commencement.

There is therefore no basis or no room for an argument that the Act has retrospective application as there is no indication to the contrary within its four corners.

[17] We are of the view that the account kept by the respondent for the condominium was not the building maintenance account, which a developer is required to open and maintain under s. 16 of the Act before delivery of vacant possession. Under s. 21 of the Act, a developer of a development area which had been completed before or on the commencement of the Act who had collected and expended monies for the purpose of the maintenance and management of the common property and sinking fund prior to the commencement of the Act, must submit to the Commissioner not later than six months after the commencement of the Act an account audited by a professional auditor. The failure to do so is an offence. However there is no provision under the Act which deems such account to be the building maintenance account for the development area and there is no provision requiring any money still available in such account to be transferred to a building maintenance account. As such the requirement under s. 22(1) of the Act that not later than one month from the date of establishment of the JMB, any money remaining in the building maintenance account after payment of any expenditure properly charged to that account, must be transferred to the JMB, could not apply to the respondent.

[18] It is also to be noted that the said sum was in fact part of the sinking funds kept by the respondent under the deed of mutual covenant entered into by the respondent and the purchasers before the commencement of the Act. The Commissioner however

A seemed to have wrongly applied the respondent's case under s. 24 of the Act which imposed upon the JMB the duty to open and maintain a sinking fund from a portion of the monies in the building maintenance fund after its creation. On this point we agree with the Court of Appeal that s. 24 of the Act has no
B relevance to the usage by the respondent of the said sum. The dispute between the parties was clearly not a dispute in respect of a building maintenance account. In the circumstances, we are of the view that the Commissioner lacked jurisdiction under s. 16(5) of the Act, or under any other provision of the Act, to give
C any decision with regard to the sum the appellant claimed must be paid over to them.

[19] On the learned judge of the High Court's finding that the respondent's conduct in not challenging the Commissioner's lack
D of jurisdiction would appear to indicate that the respondent had accepted the Commissioner's jurisdiction to determine the matter, we are in full agreement with the Court of Appeal's view that no amount of consent or acquiescence by the respondent could confer on the Commissioner a power which the Act had not
E conferred upon him. The powers and duties of the Commissioner are circumscribed by the provisions of the Act and he does not have power which has not been granted to him under the Act.

[20] For the reasons abovestated the answers to questions (1)
F and (2) posed before this court ought to be in the negative and since question (2) is answered in the negative, Question (3) therefore need not be answered. The appeal by the appellant is consequently dismissed with costs.

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